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AUG 26 1943
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,

Appellant,

vs.

J. A. KIRCHWEHM.

APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

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I.

Jurisdictional Point Already Decided by This Court in a Companion Case.

Our first contention is that the jurisdictional point involved here has already been decided by this Court, adversely to appellant's right of appeal, in what might well be called the companion case of

Alropa Corp. v. *Kirchwehm* (1941), 313 U. S. p. 549, 85 L. Ed. p. 1514.

In the *Alropa* case, this same appellee, Kirchwehm, was sued in the Common Pleas Court of Clark County, Ohio, upon an identical cause of action arisen in Florida and growing out of his acceptance as grantee of a deed poll containing a clause that he assumed and agreed to pay an existing mortgage on the land. The cause of action accrued not later than July 29, 1927. Suit was not brought in Ohio until more than seven years later—December 5, 1934.

The Ohio Supreme Court held that for procedural purposes and in determining the propriety of a suit against Kirchwehm in an Ohio Court, the character of his obligation should be determined by the law of the forum of Ohio, and that under Ohio law this obligation was that of a simple contract in writing, only, and at the most.

It held further, that while the Ohio limitation period on simple contracts in writing is fifteen years (Sec. 11221 G. C. Ohio) yet the Florida limitation period on such contracts is five years only (Sec. 4663-2 C. G. L. Florida). Then in view of the mandate of Sec. 11234, G. C. Ohio, providing in substance that where a cause of action arising outside Ohio is sued on in Ohio, and the limitation period of the State of origin is less than that of Ohio, the cause shall be barred at the expiration of the lesser period, it proceeded to hold that the case against Kirchwehm should have been dismissed by the Ohio trial Court because not brought within five years after accrual of the cause of action, and it affirmed a judgment by the Ohio (intermediate) Court of Appeals which had directed the trial court so to do.

Alropa Corp v. *Kirchwehm,* (1941), 138 O. S. p. 30.

It is perhaps not out of place to note that although the name of the plaintiff in that case and of the one in this case are not the same, yet each has had the same general counsel, Messrs. Blanc & Steinberg of Philadelphia, Pa., who, after

losing the *Alropa* case, proceeded to sue Kirchwehm over again upon a practically identical cause of action, in the Court of Common Pleas of Cuyahoga County, Ohio, which is the present litigation.

But that was not until after they had attempted to appeal the *Alropa* case to this Court upon precisely the same alleged Federal constitutional grounds as are now being urged here. This Court dismissed that appeal. *Alropa Corp.* v. *Kirchwehm* (*supra*) 313 U. S. 549; 85 L. Ed. 1514.

This decision, we urge, should govern the case at bar. It is that the appeal should be dismissed for want of a "properly presented" "substantial" Federal question (quotations ours). While the decision is in memorandum form, and per curiam, nevertheless the Court was at pains to cite three groups of precedents as justifying the action taken.

The first two groups refer to mechanical defects in the appellate procedure, which have since been corrected in the record and procedure here, and would seem to have no bearing on the present controversy.

But the third group appears to define the requisites of such a "*substantial* Federal question" as will warrant this Court in reviewing a judgment of a State Court of last resort.

We comment briefly upon them;—

Johnson v. *New York Life Ins. Co.* (187 U. S. 491)—cited by this Court in the Alropa decision as "187 U. S. 491-496".

It is apparent that two questions were disposed of here; the first being procedural, to-wit, that it is too late to try to inject a Federal question into a State Court case by first setting it up in the petition for a writ of error. But the second, we urge, dealt with and decided whether there was, in fact, such a substantial Federal question in that record

as would impel this Court to take jurisdiction. We quote from Page 495:

> "The Supreme Court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully (Page 496) considered, and the decision of the state courts of New York were called to its attention and cited in its opinion.—*Whether the Supreme Court of Iowa was correct in its consideration of the applicability of the New York notice statute to this policy was immaterial since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case.* (Citing Cases) To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.
>
> "The validity of the New York statute was not called in question. *The case turned upon its construction. This was not a Federal question.*" (Italics supplied.)

Kryger v. *Wilson, et al.*, 242 U. S. Page 171—cited by this Court in the Alropa decision "242 U. S. 171-176" and here we find that on Page 176 there is a discussion and determination of whether the issue presented to this Court there involved a "substantial" Federal question.

We quote from Page 176:

> "The most that the plaintiff in error can say is that the state court made a *mistaken application of the doctrine of the conflict of laws* in deciding that the cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned." Citing Finney *v.* Guy. (Italics supplied.)

And, lastly, *Finney* v. *Guy*, 189 U. S. 335, cited by this Court in the Alropa decision as "189 U. S. 335, 340".

And on Page 340, we find the following:

> "Whether a cause of action is stated in a pleading, is generally to be decided with reference to the law of the State where the action is pending. If the State Court holds that no cause of action is set forth in the pleading and that it is against the public policy of the State to permit an action for such a purpose, we should generally hold that there is no Federal question involved in such determination. The plaintiffs, however, urge that there is here an exception to that rule founded upon the considerations just stated, *and that if under the Minnesota law this action could be maintained, the Courts of Wisconsin are bound to entertain jurisdiction to the same extent.* It is not, however, the case that every decision regarding the proper construction of the statute of another state, involves a Federal question: Where the case turns upon the construction and not the validity of the statute, a decision of that question is not necessarily of a Federal character." Citing Johnson *v.* New York Life Insurance Co. (Italics supplied.)

So it would seem beyond question, we urge, that the Alropa decision, quite apart and aside from any defects in the procedure which might have been found there, was careful to include a third ground, to-wit, lack of a "substantial Federal question". Otherwise, it would not have cited the precedents in Group three in the manner in which it did.

On this point, appellant here, in his application for a rehearing before the Ohio Supreme Court, took the ground that as this Court found it had no jurisdiction over the *Alropa* case because of procedural defects in the record, therefore it had no power to decide anything else, and may not be presumed to have intended to do so. But that is exactly what this Court did in *Johnson* v. *New York Life Ins. Co.* (supra), 187 U. S. 491, 496. There, after deciding

first that the case was improperly in Court on account of procedural defects, it proceeded, nevertheless, to add the additional ground that the record exhibited no substantial Federal question.

Conclusion.

So we submit for this Court's consideration our conclusion that this attempted appeal as of right from the Ohio Supreme Court's judgment is as barren of any substantial Federal question as was opposing counsel's former attempted appeal in the *Alropa* case, and should therefore be likewise as summarily dismissed;—unless the additional allegation here that Kirchwehm, after accepting the deed poll in Florida but before any cause of action accrued against him thereon, departed from that State and never thereafter returned, injects into the record a substantial Federal question which was not there before.

II.

Kirchwehm's Absence from Florida.

It is true that Kirchwehm's absence from Florida was neither pleaded nor attempted to be proved in the *Alropa* case. It is further true that the high Courts of some of the States, declaring their own local law, hold that their so-called "borrowing" statutes similar to Sec. 11234 G. C. Ohio must be construed as borrowing not only the limitation statutes of the foreign States but also the foreign States' "tolling" statutes, while others hold to the contrary. Ohio is one of the latter. Ohio holds that its Section 11234 G. C. borrows the foreign States' statute of limitations on a foreign-arising cause of action, if shorter than ours, but does not borrow the foreign States' tolling statute. The

reasons for such an interpretation are expressed by Weygandt, C. J., in the case at bar as follows:

> "It is the plaintiff's theory that if Florida's shorter, five-year limitation is to be given effect here, her tolling statute must by implication be accorded equal recognition here. In other words, the plaintiff contends that the absence of the defendant from Florida tolls the statute of limitation in both Florida and Ohio irrespective of the defendant's presence in Ohio where he has been served with summons. However, a study of the previously quoted statutes of the two states discloses no implied legislative intention to give procedural effect to a so-called "absence" provision in a state in which a defendant is in fact present. It would indeed be an anomalous bit of logic to hold that although the defendant has been in Ohio and therefore subject to an action by the plaintiff in this forum, nevertheless the statute of limitation has been prevented from running against the plaintiff in Ohio for no other reason than that the defendant has been absent from Florida.
>
> This court is of the opinion that the single factual difference does not distinguish this from the Alropa case, supra."

Payne v. *Kirchwehm*, 141 O. S. 384 at 387 and 388.

And the same thought is expressed by Lloyd, J. in

Bowers v. *Holabird*, 51 O. A. 413

in the following language:

> "The statute of limitations is not a will-o-the-wisp that can fly from one state to another as fancy dictates. To hold that the Illinois limitation of ten years is superseded by the Ohio limitation of fifteen years, because the operation of the Illinois statute is suspended by Section 19, which requires the subtraction from the limitation period within which an action may be brought in that state of the time of absence therefrom prior to the expiration of the limitation, would create a strange paradox. If this construction were to be

adopted, then, since the Illinois and not the Ohio statute of limitations must be held to apply to the alleged cause of action of Bowers, Holabird, while continuing to reside in Ohio, and regardless of how many years beyond ten years he had resided therein, could not claim the benefit of either the Illinois or Ohio statute of limitations in an action brought against him on the note in Ohio. Bowers had ten years in which to prosecute his cause of action in the state of Ohio. For some reason he chose not to do so but to await the possible return of Holabird to Illinois. Now he is too late."

And, in fact, the only dissenting voice in Ohio which we can find is the decision of the Cuyahoga County Court of Appeals below—no opinion at all having been rendered, and the Presiding Judge, Leighley, dissenting.

In quite a number of States, as appellant notes, the rule is different and their Courts construe their borrowing statutes to borrow not only the limitation statute of the foreign State, if shorter, but also her tolling statute. But in not one of them, so far as we can find, is there the slightest suggestion that the matter is other than a purely local one, or that it involves however remotely any lurking constitutional or Federal question, and this regardless of whichever way the point has been decided in the particular jurisdiction.

The only claim which appellant seems to be offering on this branch of his jurisdictional statement is that while the Federal constitution permits Ohio to adopt into and as part of its own law the Florida statute of Limitations upon suits on simple contracts, if the suit is brought in Ohio, yet if it does so, there is a constitutional mandate that it must also adopt Florida Tolling Statute, 4648-4 G. C. L. Florida. But we find nothing either in appellant's statement supporting jurisdiction, or any of the precedents therein cited, to require such a conclusion; nor, in fact, does any legalistic theory seem to be advanced to countenance it.

Certainly when the Ohio Supreme Court construes Section 11234 G. C. Ohio as permitting the borrowing in a case such as this of the Florida statute of limitations on simple contracts, but does not require the contemporaneous borrowing of the Florida tolling statute, it is not declaring any Florida statute invalid;—it is not even to our minds construing any Florida statute, it is laying down a purely local rule as to the proper construction and application, for Ohio procedural purposes, of an enactment of the Ohio Legislature. The fact that State Courts of other jurisdictions may see fit to construe their own similar enactments differently is of no moment, certainly of no constitutional moment.

In the many Federal and State Court precedents cited by the Ohio Supreme Court in *Alropa Corp* v. *Kirchwehm*, 138 O. S. 30, to the point that when a legal document drawn and executed in one State is presented for suit in another, the determination of its legal status for the purpose of applying the statute of limitations of the forum, must be by the law of the forum, there is no suggestion by any of the respective Courts, or the litigants therein, that such a determination raises any Federal constitutional question.

Willard v. *Wood*, 4 Mackeys Reports 538 164 U. S. 502;
Coral Gables Inc. v. *Christopher*, 108 Vermont 414;
Mercers Estate, 330 Pa. 475;
Burns Mortgage Co. v. *Hardy*, 19 Fed. Supp. 827;
Alropa Corp. v. *Rossee*, 86 Fed. (2d) 118;
LeRoy v. *Beard*, 49 U. S. 451;
Mandru v. *Ashly*, 108 Md. 693.

And if we correctly appraise this Court's dismissal of the appeal in *Alropa* v. *Kirchwehm*, 313 U. S. p. 549, no such constitutional question is brought into the picture from the circumstance that the limitation law of the State of forum

is arrived at through the application of a borrowing statute passed by the legislature of the forum.

And if, as in this case, the Ohio courts have construed the Ohio borrowing statute, Section 11234 G. C. O., as requiring our Tribunals to borrow the Florida five-year statute of limitations on simple contracts but preclude their borrowing of the Florida tolling statute, we urge the matter is still one of purely local law, in the decision of which, no provision of the Federal constitution is offended or affected.

It is therefore respectfully submitted that the motion accompanying this statement to dismiss the appeal should be sustained and the appeal should be dismissed on the ground that the record fails to disclose any substantial Federal question.

Signed:

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MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

Now comes J. A. Kirchwehm, Appellee, by his counsel of record and moves this Hon. Court to dismiss this appeal heretofore allowed on July 17, 1943, by the Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, for the reason that the record fails to disclose the existence of any substantial Federal question raised thereby.

Signed:

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